

Past Injustice and Contemporary Claims

A normative inquiry of historical rights and grounds for indigenous minorities' claims for ownership of land and resources

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1. Introduction

1.1 Minority rights and indigenous people – a general background

Who is the rightful owner of the land on which indigenous people live? Is there a special way of justifying indigenous people's rights? Do minorities, such as the Saami people in Norway, aboriginals in Australia or comparable groups around the world, have historical rights to property that ought to be recognised by the larger society? Can such rights be grounded on principles of compensatory justice because of states' or other people's wrong acts in the past? How should we appraise and solve moral questions concerning historical injustice in general? What about the justificatory correspondence between human needs and rights? Is culture - as some political theorists believe - a human good or a need that has to be protected by rights? If so, how should we appraise collective claims to land based on such premises?

The subject of minority rights has attracted the attention of political philosophers throughout the past decades or so and belongs to a diverse and complex set of contemporary debates about rights and justice within modern normative political theory. As the opening lines of this paper point towards, numerous questions have been raised and discussed in order to defend or discourage the normative basis for minority rights. The solutions to these problems are, however, uncompleted in theory as well as in the politics that are carried out in many parts of the world today.

Some have pointed out that early political theory disregarded indigenous peoples' rights because these groups did not fit the philosophical or political standards that had been established regarding justifying rights. In the heydays of the Enlightenment such people were commonly regarded as uncivilised and primitive societies that met neither the requirements used to justify individual property rights or collective territorial ownership (arrangements that were usually reserved as state territory) (Valadez 1998: 666, Tully 1995: 159). It has also been claimed that traditional political theory on democracy and liberalism ignored the problems connected with

cultural groups in general, and thereby neglected minority groups' demands to decide their own matters. According to early theorists on democratic thought, such as Rousseau and Locke, any disputes of cultural origin should be subjected to the 'common will' (Rousseau) of the people or to the idea that cultural minorities were citizens who had been outnumbered in the contest for political consent (Locke). Locke's theory of natural rights for instance was meant to secure individual freedom and rights through government and rule of law. He considered all citizens within a community as equals, and political decision-making was a task for the majority of the people. By this token, the majority decisions of the people as a whole were considered more important than securing group interests (Freeman 2001: 115, Locke 1690/1984).

1.2 The idea of self-determination

One prominent and recurring issue that pertains to the theoretical field of minority rights is the claim concerning *self-determination*. The category of self-determination is generally associated with matters such as the right a group, usually a national one, or a state may have to decide its course of life in terms of economic interests, socio-political institutions and cultural practices (Valdez 1998: 665, Tamir 1995: 69).

Another aspect of self-determination is the idea of *territorial autonomy* – the right a group or state may have to manage the use of a certain country and its resources without interference from other states or communities (Valdez: 665). The quest for land is one of the most crucial concerns for many indigenous and tribal peoples in the world today, and the dispossession of this good is, according to Eide (2001: 129) and others, caused in many cases by a long-time injustice performed by dominant groups or states.

1.3 Equality and culture

In contemporary political thought, the equality-argument has been given enthusiastic approval by liberals such as John Rawls (1973) and Brian Barry (2000). Both have claimed liberalism should primarily defend equal treatment of all citizens within a social unit such as states - regardless of the citizens' cultural heritage or ethnic origin. Barry has criticised those who defend "a politics of difference" (Ibid.: 21) and those who argue in favour of a division of rights along cultural distinctions. This strategy is misguided, he argues, and a way of favouring the groups

"[...] that can most effectively mobilise to make claims on the polity, or at any rate it rewards ethno-cultural entrepreneurs who can exploit its potential for their own ends by mobilising a constituency around a set of sectional demands" (Ibid.: 21).

Another sceptic of this cultural rights approach is Jeremy Waldron (1995). For instance, he rejects arguments in which culture is considered a precondition for the human ability to make rational and meaningful choices - primarily because he believes it is based on wrong epistemological judgements.

However, both contemporary liberals and philosophers, who represent what may be denoted as the communitarian faction, have joined in a corps of criticism against classical liberalism, largely due to its categorical concentration on individuals and disregard of the value of culture and community. Will Kymlicka has appraised the value of culture on a par with what Rawls has categorised as *primary goods* (Kymlicka 1989: 177-178). He seems to believe that people's access to this good is a prerequisite for their prospects to be able to make autonomous and meaningful choices. For this reason he seeks to justify what he calls group-specific rights, i.e. rights that should protect the collective interests of minority peoples (Kymlicka 1995: 76, 83).

1.4 Indigenous people and international law

In terms of what may be called the legal paradigm and human rights' conventions, minority people have in general gained considerable attention over the past 50 years or so. The process of developing such rights within the field of human rights' theory and practice has nevertheless been a contested and difficult issue ever since it became a topic on the work agenda of the United Nations after the Second World War.

Despite the academic and political controversies within the field, some international norms concerning the collective interests of minority people have been established.

A prominent international specification of minority rights is stated in Article 27 in the International Covenant on Civil and Political Rights. One important principle from this convention is that states, in which ethnic, religious or linguistic minorities exist, should give members of such groups rights that secure their ability to enjoy their culture in community with fellow associates and rights to practise such things as their own religion and language (Freeman 2001: 115).

As Freeman (2002: 121) argues, minority rights are often confused with the rights of indigenous peoples. Traditionally, the term indigenous was used to describe natives or communities who had settled on the American continent before the arrival of European colonisers. The use of this word in other parts of the world has proved to be challenging. One reason is that it is not always a clear-cut task to distinguish those who are 'rightfully' indigenous inhabitants in an area from those who are not (Ibid.: 122-123).

Even if the semantics and use of the term has not been clarified unanimously, many assume that such groups are recognisable as communities with particular social and economic needs that require special political attention. I believe that few will deny that societies of this kind have been politically and socially marginalised in many parts of the world throughout history. Many went through brutal injustices such as enslavement, mass killing and violent dispossession of their traditional homelands as a result of colonising and systematic defrauding. Some have argued that they should

not only be regarded as distinct cultures, but as distinct civilisations that are rooted in a long-established, pre-modern way of life. If they are to be able to stand against forced change of their customs and social practises they need to have these interests protected by rights (Eide 2001: 129, Freeman 2001: 122-123, Kymlicka 2001: 128-129, Valdez 1998: 665-666).

The ILO Convention

The special category of *indigenous rights* became pertinent in the UN system after exploitation of the indigenous peoples' workforce was put on the organisation's list of human rights issues in the 20th century. One result of this debate was the establishment of ILO Convention 107. A primary aim was to secure indigenous groups the same rights as the majority population within a state. This convention was amended as ILO convention 169 in 1989. The convention has been considered by many as an unsatisfactory attempt to establish the rights of minority and indigenous people, mainly because it has been regarded as consisting of top-down solutions that favour states and disregard such group's demands for cultural recognition and self-determination (Freeman 2001.: 122).

A UN Working group in association with representatives from indigenous communities all over the world has sketched a Draft Declaration on the Rights of Indigenous People. The right to territorial and cultural self-determination is a major subject within this. In general, governments have yet to accept these kinds of demands, and the work on incorporating them into international and national law has proved to be a long-winded and highly challenging process (Ibid.: 123).

1.5 The questions

It is of course beyond the scope of this thesis to reply to all the relevant parts of the ongoing debate about minority and indigenous rights, and it would be impossible to pay equal attention to all aspects that may deserve thorough examination. The topic is ownership of land and natural resources. My purpose is to discuss the normative

appropriateness of indigenous groups' historical rights to such goods – not so much in the court of law as in the court of moral consciousness. I think it is possible to distinguish two broad philosophical and normative approaches that have been suggested in order to ground the rights of indigenous and minority people's property rights. One is historical rights theory, while the other category comprises different theories regarding human needs.

When political philosophers talk about historical rights they are usually referring to property rights where the holders have acquired certain holdings by virtue of some specific events that happened in the past. A right to a piece of land is then justified because an individual or a group were the first to occupy and cultivate it or because someone acquired it by means of phenomena such as a contract or heritage (Gans 2001: 58-59, Nozick 1974). Many questions arise when we try to justify such claims. How do time and social change encroach on someone's property rights? Do people have absolute rights to ownership of land and resources in this case which they have acquired by an approved standard of acquisition or transfer, such as inheritance, or by a principle of corrective justice? Subsequently, one major question that I shall try to answer in this essay can be outlined as follows:

Is a backward-looking concept of justice a sound way of justifying indigenous peoples' rights to property? In other words, do such groups have historical rights to collective ownership of land and resources?

Another well-known way of justifying property rights is to ground such claims on human needs. I have already introduced a version of this approach, i.e. the justification of people's need to belong to a certain culture or community. The second pair of questions that I shall try to answer can be regarded as a possible alternative to the historical approach:

Do people have a right to culture? And, in continuation of that, do cultural rights justify indigenous groups' collective claims to ownership of land and resources?

1.6 Outline

On the remaining pages of this introductory chapter I shall present some lines on normative theory in general (1.4). In *chapter two* I continue with a discussion of two well-known theoretical approaches that aim to ground individual rights to property – John Locke’s famous labour-mixing thesis and Robert Nozick’s entitlement theory. The main purpose in this section is to reflect upon the prospects for property rights in general and the entitlement theory in particular and portray some commonly known normative principles that can be deduced from historical rights theory.

Chapter three is primarily devoted to the theoretical difficulties that have been associated with a backward-looking concept of justice. The theoretical consistency of the historical approach, as endorsed by moral philosophers like Nozick, has been criticised for being both anti-social and unacceptable due to the epistemological uncertainty that seems to be an inescapable feature of historical reasoning. In this section I reveal some common objections that pertain to justifying indigenous peoples’ historical rights to land and resources using a Nozickean justificatory model.

To finish, I suggest that questions concerning historical injustice must take into account that time and social change may weaken someone’s rights to property. Ownership of land and resources is then not a human interest that can be absolute but rather a kind of social arrangement that must bend to the needs and well-being of human beings on a larger scale. Different social circumstances may thus demand of us that we use our ability of moral judgement when considering the justness of property rights. I also claim that just treatment of indigenous peoples’ demands for collective ownership is, in the end, a matter that concerns those living today and not something that can be based on their ancestors’ encounters with a certain injustice that occurred in the past. One possible situation, however, is that the ill that was performed sometime in the past may endure as a circumstance that remains an injustice to members of indigenous communities who live now or who may live sometime in the future.

In *chapter four* I follow up the judgements from the previous chapter and proceed with a further examination of a forward-looking argument. The purpose here is to examine whether indigenous peoples' collective rights to land and resources belong to a broader concept of people's right to *cultural belonging* – a normative approach where human needs or well-being are considered the deepest premise. First, I try to lay bare some thoughts on the concept of human well-being. I go on with a discussion of the normative strengths and shortcomings that I think can be revealed when examining some prominent contributors to the cultural-rights strategy (first and foremost the standpoints of Will Kymlicka).

A major outcome of this discussion is a thesis in which I regard culture as a subjective good or a particularistic interest that can be applied as a *prima facie* justification of indigenous peoples' rights to collective ownership of land and resources. An additional aspect of the culture argument is that it is assumed that people need institutionalised practices to be able to plan their lives and adjust the pace of social change that the future may bring.

In *chapter five* I wind up my theoretical conclusions and introduce some general remarks about moral conflicts and Charles Larmore's thoughts on moral judgement. In *chapter six* I provide a brief overview of the Saami rights' debate in Norway. This is not a case that will be examined thoroughly, but rather an empirical accompaniment and background story to the general theoretical discussion.

1.7 On normative reasoning

Broadly speaking, normative political theory can be regarded as the making of theory that is concerned with how the world *ought* to be in contrast to how it actually *is*. More narrowly, it can be regarded as a branch of moral philosophy – as the enterprise of uncovering the moral questions that pertain to the sphere of politics. Ideally, a major task in normative theory is then to become aware of grounds for right action and to establish principles for social behaviour and political institutions (Beauchamp 1991: 35).

Some philosophers are, for various reasons, sceptical about the idea that we are able to arrive at any true propositions about the moral world. A common view among the sceptics is that normative arguments can never rest on reliable facts. Objective values and true propositions about right and wrong, they say, are impossible to accomplish. I shall set the ontological debate about moral realism aside and instead concentrate on an assumption that it is possible to establish reliable arguments about right and wrong, and still, as Larmore (1987) and Malnes (1997: 158-161) contend, be aware of the fact that there may be limits to what theory can accomplish in the field of ethics.

As Malnes (1997: 158-159) argues, the realities of life will always provide us with hard theoretical cases and demands that we are unable to comply with sometimes in practice. He argues, for example, that it would be unreasonable to insist that a refugee who faces death in a refugee camp due to starvation should have a moral duty to give away a small amount of food to the greater group of people. This insight into reality brings to mind the idea that few people are physically and mentally able to show benevolence when their own lives are severely endangered. In some situations, moral consciousness is then regarded as being inconsistent with our psychology and the enablement of people's motivation for impartial thinking (Ibid.: 159).

Sometimes the arguments sorted out in theory face more or less unsolvable challenges in the real world, and an uncompromising adherence to a certain principle may then be impossible. Under such conditions, we may have to realise that we confront conflicts and moral dilemmas. We may then be forced to put our faith in our ability to apply a sense of *moral judgement* - to distinguish between right and wrong conduct without being able to clarify our reasons on a deeper theoretical level (Larmore 1987: 19-21). As Larmore argues (Ibid.: 5), our moral duties are thus governed by rules which "by themselves cannot sufficiently determine whether in particular circumstances these duties have a claim on what we should do, and if so, what actions would satisfy these duties". I return to these problems in the final section.

Limits and consequences

If we accept the somewhat pragmatic learning about morality given above, we can regard the normative questions put forward in this thesis as practical matters that in all likelihood will be difficult to handle in the real world. But despite the theoretical difficulties we are destined to cope with, and the fact that there is the constant risk of hard cases and situations for which normative reasoning seems irrelevant, the risk of making the wrong decisions becomes less when we apply a rational explanation as far as possible (Malnes 1997: 160-161). In other words, we should always aim at broadening our theoretical and rational reflection. This standpoint ought to count, I believe, irrespective of whether we are dealing with questions about how the world is or how it ought to be. In both approaches we need to approach our questions with systematic reasoning (Malnes 2001: 10).

The purpose of this enquiry is to discover and discuss normative arguments that may ground indigenous peoples' right to attain and possess land and natural resources. We are thus required to examine and reflect on the premises which may justify this kind of human practice and make sure that the conclusions rest on a logical inference from these premises. One way to embark on this assignment is to assume that limits or absolute boundaries between right and wrong exist (Ibid.: 11). This way of reasoning is equal to what philosophers refer to as *deontological* argumentation.

A second general way to ground social action and institutions normatively is by looking at the consequences of a certain action or decision and make up one's mind about what kind of results it would be *valuable* to pursue. In this kind of reasoning our premises rest on values. When we apply this method to normative questions, we are not concerned with the idea that something is right or wrong in itself, but rather that human action or social practices must be guided by the *consequences* they bring about in the present or sometime in the future (Ibid.: 12). The discussion of indigenous peoples' rights to land and resources in the forthcoming pages includes both methods of normative argumentation and, ultimately, an appraisal of which of the two approaches I found the most compelling.

In addition to the distinction between deontological and consequentialistic reasoning, it is common to ground certain actions or institutions by an appeal to moral *intuition*. When we justify property rights by an appeal to unshakeable convictions like intuitions, we rest our argumentation on a ground that we have no apparent reason to disbelieve. A perhaps more advanced and well-founded way to ground a certain view is to give a thorough *explanation* why a certain action or institutions are right or wrong (Ibid.:11). Both intuition and explanation become noticeable as methodological strategies in this thesis. Nozick's justification of property rights rests for example on both an intuition about all human's irreproachable and inviolable rights and on a further attempt to explain why this is so.

2. Historical Rights, Entitlements and Corrective Justice

2.1 Freedom of action

On what grounds can we state that people ought to enjoy the right to acquire and hold property? And, in continuation of that, what could be the moral foundation of rights to land and resources as claimed by indigenous peoples? A well-known approach to setting off and answering a question concerning ownership and property is to begin with a premise about the rights of individual human beings. This basic liberal idea implies what I shall call the principle of autonomy. When we talk about autonomy we are commonly referring to an idea of self-ownership and that individuals are regarded as free to decide parts of their life and be allowed to use their powers as they wish as long as these powers are not deployed aggressively on others. Individuals are therefore believed to have certain rights that no one is allowed violate. Consequently, in some situations people are then free to do as they please without being troubled with considerations of moral concern – they enjoy what is called *freedom of action* (Malnes 1988:133, Perry 1997: 359). This is a situation where no one can point at ethics and blame us for our choices or social conduct. Examples are certain political and civil rights, a right to privacy, to vote and to speak freely, or, in this case, to hold property.

Freedom of action encompasses and protects particular alternatives of human behaviour. It both permits some types of actions and equally protects against some types of interference. Even if a person always ought to act selflessly, it is not his or her *duty* to do so. Unselfishness is then no more than ideal obligations (Malnes 1988: 133). This kind of liberty serves at least two purposes. First, it defends individual interests and, secondly, it restrains other persons from harming the individual's actions or preferences. On the other hand, even if we are free to do as we like in certain situations, we are compelled to ensure that other persons do not suffer unreasonable harm or losses that can be traced back to our achievements. To

paraphrase a line from Nozick (1974: 171), even if I have the right to do what I like with my knife, I have no right to put it in your chest.

2.2 The right to property

One distinction that has usually been made is between the *content* and the *structure* of a right. The structure of a right refers to the analysis of rights – an account of what is analytically true of rights, and, as Coleman (1994: 128-129) explains, what it means to have a right. The content of a right comprises things such as the *substance* of the particular claims related with a certain type of right. If I have a right to a certain property, say a piece of land, I have a claim that in fact pertains to land as a specific object. The freedom of action that I enjoy as a holder of this land needs to be specified. I might have the authority to exclude others from using my land or charge people a fee for using it for certain purposes or put a price on it and sell it on my own terms. If the property is taken from me without my consent, I may be entitled to, as Nozick argues, to charge some form of repair for the damage done to my property right (Ibid.: 129).

Property can then be regarded as the rights, liberties, powers and liabilities a person or groups of persons, like communities or states, with specific power have over some material or immaterial good (Christman 1998: 683). If we want to show that somebody has a property right to an object of this kind we are required to analyse the elements of such rights in general and become aware of the more basic normative relations that justify it. I hope to shed some light on the difficulties and possibilities that concern these questions in the pages that follow.

2.3 The entitlement theory

Historical rights to property can be rights such as A's right to a piece of land because A was the first to occupy and cultivate it or by means of contract or voluntary transfer. Such rights are different from the right to freedom of speech or privacy, which are not historical (Gans 2001:58-59). Property rights as they are described here

pertain to specific events that occurred in the past. This bears a resemblance to a Nozickean theory of property rights – a theory that justifies ownership by looking backwards in time (Nozick 1974).

Justice in acquisition and in transfer

In accordance with this theory there are two events that need to be considered when fair distribution is to be decided. As already stated in the introduction, these requirements are *justice in acquisition* and *justice in transfer*. People are entitled to property either by virtue of being the first to obtain and develop a resource – material or immaterial – or by legitimate transfer with other people.

To summarise these principles we could say that a person is the lawful owner of a holding if it has been obtained in accordance with correct appropriation or by correct transfer from others who have a right to the holding. Justice in distribution is thus complete and satisfactory when everyone is entitled to the holdings they possess during the distribution. All previous distributions are sound only if it can be traced back to another just distribution by legitimate means (Nozick 1974:150-151).

Rectification

In the real world, many transactions among property holders do not fit the normative standard stated above. People violate other people's rights and defraud or confiscate the lawful properties of others. But if someone is injured by another's action in this way, the one responsible is morally obligated to pay the victim compensation. This introduces a third element in the entitlement theory, past injustice and *the principle of rectification* or corrective justice. (Ibid.: 150-153).

If past injustice has contributed to present holdings, it is a major normative task, as Nozick (Ibid.: 152) points out, to investigate what, if anything, ought to be done in order to rectify these wrongful actions. He assumes that human conduct is traceable through the chain of cause and effect and that justice is possible to re-establish by looking backwards in time. This argument raises unsolved questions. What kind of

moral responsibility do those responsible for wrong acts have? How shall we manage this situation if those suffering from injustice are not the direct parties in the act of injustice, but, for example, their descendant(s)? What about the temporal scope of such rights? How far back must we and *can* we go in our search for causal truth of property rights? The principle of rectification is bound to historical reasoning and presumably it will, as Nozick (Ibid.: 153) argues, “make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place”.

2.4 Some general remarks on corrective justice

I would like to present some additional comments on corrective justice. A major question about historical injustice is to find out whether or not individuals or groups are responsible for their actions or outcomes of their achievements. In accordance with what I have called the principle of autonomy and Nozick’s entitlement principles we can contend that individuals ought to be accountable for their wrongful actions. Those who are responsible for a wrong act in the past then have a duty to repair the *losses* that they bring upon others (Coleman 1994: 125). If this is true, we may say that the major point of corrective justice is not to punish someone for his behaviour. Instead, we should emphasise the importance of recognising whether the *victim’s loss* is morally wrong and thereby deserving some form of repair.

When we rely on a backward-looking concept of justice, a decisive matter is to clarify whether the injured party is morally significant in terms of compensation, not whether the one responsible is to blame. As Coleman (Ibid.: 131) explains, what matters in this case is the loss the victim has suffered and not the kind of moral character the one responsible has demonstrated. In any case, the nature of the backward-looking justice explained above imposes a *duty* of repair on those who are *responsible* for the wrongful losses of others.

Violation of rights

What can be considered a loss in this sense? It has commonly been assumed that there is a normatively significant difference between rights and interests. If my interests suffer a setback I may well also suffer a loss, but not necessarily a wrong one. As Coleman argues, rights are special ways of protecting human interests, but not all kinds of interests can legitimately be supported by rights (Ibid.: 128). One way to clarify this standpoint is to say that both interests and rights can be harmed, but it is only the wrongful losses that originate from violation of vital *rights* that deserve payback in terms of corrective justice (Ibid.: 128).

We can sum up as follows. Individuals, a group of people or a state are responsible for the losses of others only if the loss can be traced back to someone's fault. When we look for reasons for repairing a historical injustice we have to ask, as Nozick claims, whether the injurer's conduct invades someone's rights. Was the action contrary to the demands or constraints imposed by the right? Secondly, was the loss the victim suffered wrong, or within the range of the interests protected by the right? I shall return to the problems connected with corrective justice and historical injustice, but first I shall introduce and discuss two common arguments that originate from John Locke's defence of property rights in *The Second Treatise On Civil Government*.

2.5 Locke and the workmanship argument

Human beings create much of what they need by mixing their productive capacities with other resources. In political theory, the workmanship ideal has commonly been associated with Locke's idea of the merging of labour and ownership (Shapiro 1991: 47). Here is a classic passage:

“Before the appropriation of land, he who gathered as much wild fruit, killed, caught, or tamed as many of the beasts as he could – he that so employed his pains about any of the spontaneous products of Nature as any way alter them from the state Nature put them in, by placing any of his labour on them, did thereby acquire a property in them” (Locke 1690/1985: 25).

Locke's version of the entitlement argument is that people deserve the fruits of their labour. It is not the work itself that is praiseworthy but rather how it contributes to improve life conditions through the treatment and utilisation of natural resources (Malnes 1988: 140). Resources as found in nature are common to all. But if a hunter hunts down a deer, the animal becomes the property of the one who took it down. In other words, when people use their skills and work on anything found in nature, the results of this work become their property. As a consequence, when a piece of land is cultivated and the grain is harvested and sold, the surplus of this work is the property of the farmers who invested their labour in it. To mix one's labour with a piece of land in this manner "removes it from common stock of land that has been provided for all humanity and gives one original title to it" (Locke 1690/1985).

Locke's cultivation test is directed towards producing food and making use of a piece of land or other forms of property to the best advantage of life and to the convenience, support and comfort of all human beings. Consequently, humans' need to preserve and support their life as well as possible may be understood as a good reason to acquire and develop property by industrial means. How can the workmanship argument based on this 'cultivation test' be useful in an argument that defends indigenous peoples' rights to own their land?

2.6 Criticism of Locke's justification

As both Robert Nozick and David Lyons (Lyons 1982: 361) have suggested, mixing one's labour with something may be a way of losing one's labour rather than acquiring a special right to own something. If I empty a can of tomato juice in the sea it is difficult to see how I have may have accomplished anything apart from wasting a can of juice. A moment's thought exposes the agricultural premise to more criticism. Lyons argues for example that obtaining food by agricultural means is not the only way of investing labour in land. Land can effectively be used in other ways, e.g. hunting, gathering and herding (Ibid.: 361). And, of course, land can be utilised in

ways that has nothing to do with agriculture at all and still be an important cause of human welfare and misery.

Another example that may cast doubt on the labour mixing argument concerns the link between labour and ownership. Nozick asks: How can we decide the boundaries of what labour is mixed with? If I build a fence around a piece of land, do I own the land encircled by the fence or just the fence itself and the land immediately underneath it? What if one day a private person manages to be the first to obtain a piece of Mars. Is that person entitled to the entire universe, the whole planet or just a particular piece of the surface of the planet? (Ibid.: 174-175).

Locke on indigenous people

James Tully has tried to reveal Locke's arguments as a way of justifying the European settlement in North America in the 16th century. He argues that Locke produced arguments that mutually weakened two major conditions which concern the Native Americans rights to property in the colonial days, namely their political organisation and system of property (Tully 1994: 159). This denial of indigenous peoples' rights, he argues, has permeated the Western view on property rights since Locke.

I shall present Tully's reasoning briefly. First, he claims that Locke takes for granted the idea that indigenous people are in a pre-political state of nature, and that the North American Indians, possessing neither government nor property in their hunting and gathering territories, are not to be considered as legitimate holders of property (Ibid.: 159). The Indians were considered as living in "a state of nature" (Ibid.: 159) or lived in the first stage of social order which all societies go through. European societies, on the other hand, represent the most advanced or civilised stage in this process, with established property rights, a political system, and developed, market-oriented agriculture and industry.

A second argument that Tully criticises is that the indigenous people in America, possessing neither government nor property in their hunting and gathering territories,

should only have property rights in the products of their labour – in the fruit they pick or the deer they hunt down. And, as a consequence, “anyone in a state of nature is free to appropriate land without the consent of others as long as the land is uncultivated and there is enough, and as good left in common to others” (Ibid.: 159). This means, according to Tully, that the Europeans were free to appropriate land without the consent of the indigenous people of America. He winds up this remark by stating that Locke concludes that Europeans are free to “settle and acquire property rights to vacant land in America by agricultural cultivation without the consent of the Aboriginal people” (Ibid.: 156). He claims that Locke stipulates that *vacant* is tantamount to land that is uncultivated or unimproved, and that it does not fit the requirements of labour and cultivation. But do we have to accept Locke’s rather narrow cultivation test as being a good reason to appropriate property?

2.7 Nozick and the proviso-argument

I shall now go on and discuss a second argument that stems from Locke’s theory; namely what has been known as the *Lockean proviso* (Ibid.: 175). If labour is the unquestionable property of the labourer, as Locke argues, no one can be deprived of that right “at least where there is enough, and as good left in common for others” (Locke 1690/1985: 20).

If we rely on the previous argumentation, we can establish the moral foundations of someone’s ownership by proving that the one who appropriated the thing did so in accordance with a principle of justice in acquisition or a principle of just transfer. As mentioned, however, there are limits on how much one person should be able to acquire on behalf of other people. One possible margin is that people are allowed to make use of as much as can be taken advantage of before it spoils or “so much he may by his labour fix a property in. As Locke (Ibid.: 21) argues, whatever is beyond this is more than his share, and belongs to others”(Ibid.: 21). This idea entails that people are not allowed to waste resources.

This implies that the principle of acquisition is unsound if there is not enough ‘property’ left for others because of someone’s misuse of resources. This moral yardstick can be regarded as a restriction on the principle of autonomy. Nobody has a right to waste resources that others need or could have taken advantage of in a better way. This is Nozick’s purpose when he applies the proviso to his argument, and it is, he claims, a sufficient condition.

The things that ought to decide are, therefore, whether the appropriation of an object *worsens* the situation of others. Nozick (1974: 170) argues that someone is worse off by another’s appropriation in at least two ways - either by losing the opportunity to improve one’s livelihood by appropriation, or by no longer being able to use freely (without appropriation) what one could previously. The latter is a minimum requirement for a just acquisition. If this proviso excludes someone’s possibility to get hold of, let us say, all the drinkable water in the world, all the oil or cultivable land available, it also rules out someone’s desire to purchase it all. An individual is not allowed to appropriate the only waterhole available in a desert and charge his or her heart’s desire for its use or deny others to use it.

A major point in his theory is that someone who worsens the situation of others *may still appropriate provided that the loss of others is compensated*. This is a substantial issue that pertains to the intention of the proviso and his views on legitimate constraints on a person’s individual freedom of action. And, as he (?) puts it, “unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one” (Ibid.: 177).

2.8 Summary

I shall run through some of the major points of the libertarian justification of property rights and comment on how this approach can be relevant to claims by indigenous peoples’ claims to land and resources. The secular version of the Lockean justification of property rights based on a premise about human needs, the labour mixing-argument and ideas about cultivation seems to neglect the traditional ways of

life of indigenous people and the culturally defined way of social organisation. As Lyons and Nozick argues, to obtain food by agricultural as a way to increase people's welfare is not the only way to invest labour in land. To combine one's labour with land is perhaps also a way of losing one's labour rather than acquiring a special right to own a piece of land. Tully's objection to Locke's theory is primarily directed towards Locke's disregard of indigenous peoples' collective, customary practices. In Locke's workmanship thesis, there is no leeway for justifying *collective* property rights.

In a libertarian, rights-based argument, humans have unconditional rights to own their properties. As long as we respect others have the same rights and do not encumber their freedom, no one has rights to what we have put our effort and labour into acquiring. The way Nozick mixes freedom and property is primarily associated with the natural right to personal liberty – a liberty that is constrained by the conditions provided by the Lockean proviso. Individual entitlements are what the state ought to protect, and any violation of these rights are morally unacceptable. It is thus presupposed that a principle of non-interference rules out any form of compulsory redistribution or any paternalistic demands that may force anyone to give away something that is acquired or transferred properly. If someone is injured by another's action, the one responsible is morally obligated to pay the victim compensation. This strategy is a way to justify individual rights to property.

3. Common Objections to Historical Rights Theory and a Forward-Looking Alternative

3.1 Three arguments against historical rights

The question of collective rights will be examined further in chapter four. In this section I shall give attention to some common objections to the Nozickean way of reasoning. Justification of social arrangements by looking backwards in time has repeatedly been objected to and found morally unsatisfactory among political theorists. How can past events and historical conditions, critics have asked, justify who owns what and serve as a basis for principles that we use in our verdict of what constitutes a just society today? Although the list of criticism of the entitlement theory is long, my purpose is not to work out a comprehensive account dealing with the dissatisfaction with Nozick's theory.

The criticism presented here is threefold. The first regards what may be described as the *epistemological problems* that are connected to the entitlement approach. Nozick argues, for example, that people have rights to inherit property and that compensation is a just response if someone has been deprived of their rights. It is highly foreseeable that the assignment of reconstructing the history of transfers becomes troublesome the further back in time we go. How can we ever manage to get a correct account of things that occurred in the past? One answer is that we simply do not have what it takes, in terms of reliable historical information, to base our normative standards on past actions and transfers of property.

The second criticism may be called a *forward-looking* reply to the historical approach. Instead of looking backwards in time for moral and normative solutions we should instead direct our view and judgements toward political solutions that result in the best consequences for people living today and to future generations. The third objection concerns Nozick's understanding of the proviso-principle. I shall call this criticism *the extended proviso-argument*. Nozick's social compassion is somewhat

limited in time. If a transfer or an original acquisition have been carried out properly, it is not necessary to bother about what may have happened later. There is, according to Nozick, no more need to redistribute resources than there is a need to distribute “mates in a society in which persons choose whom they shall marry (Nozick 1974: 150). We may argue the opposite - that individual freedom must be limited if human needs are endangered in the future. Therefore, we may argue that redistribution is obligatory if social destitution looms.

The fourth issue that is discussed in this chapter is not part of the objections directed towards Nozick’s historical approach. At the end of this chapter I shall describe a somewhat hypothetical situation, a situation where a certain wrong act in the past is to be considered an injustice that remains an injustice in the present – or what Waldron (1993) categorises as situations of *persisting injustice* (this thought will be developed in more detail when I merge a forward-looking method with a need-based argument to ground indigenous property rights in chapter four).

3.2 The epistemological objection

One of the most prominent criticisms of the entitlement theory and of original acquisition justification of property has stressed the distance between any rights we might today be interested in trying to justify and a presumed human action in the past (Simmons 1994: 73). This question pertains to the epistemological uncertainty that is an inescapable feature of moral retrospection. Nozick seems to believe that we are able to repair past injustices by a backward-looking strategy. As I explained in the previous chapter, his principle of rectification involves an idea of casual inspection and that we are able to attain reliable information of accountable human action in the past (Nozick 1974: 152, Waldron 1992: 8). This method of retrospection is based on historical information about acquisitions.

Although some principle of compensation for the lasting effects of historical injustice might seem appropriate, the proper temporal scope of corrective justice is not clear. One alternative can be as follows: even if we are unable to rediscover the exact

course of history, and thereby be able to restore complete justice, we may get closer to what is just than we are now. As Waldron (1982: 89) argues, we may attain some information of the past by applying rational choice models, relying on natural laws or guessing the results of the normal course of events. The principle, however, becomes troublesome as soon as we try to use it on real situations. We may be in a position to grant compensation for a wrongdoing that originates a few years from the present time, but what about cases which go back a hundred generations or perhaps even a thousand?

As George Sher (1981: 3-4) has pointed out, it is probably true that many people living today would probably have been better off if things in the past had not occurred. In that history is full of wrongful acts, it may be reasonable to assume that all current individuals have benefited and been disadvantaged by different historical wrongdoings. Some acts have given some persons a form of prerogative while others have certainly been less blessed by specific incidents in the past. Sher's point is that neither the distribution of goods which exists today nor the distribution that would have existed in the absence of all recent injustice are likely to resemble the distribution of goods which actually would exist if none of the wrongful acts had ever taken place (Ibid.: 5).

Some examples

Let us consider some well-known stories of presumed historical injustice. Few will deny that the Europeans settlements in America led to many indigenous groups being conquered and dispossessed of their lands. Many of those who survived were displaced from their original homelands and forced to continue their life in reservations. Another example that may fit this description is the Europeans' behaviour in Africa and Asia during in the 18th and 19th century. The colonial powers conquered great parts of the world and deprived the local inhabitants of their resources using coercion and fraud. We may also apply the same reasoning to the case of the Saami people. Despite the fact that their history has been spared the high level of bloodshed and violence that characterised the destiny of similar groups in

other parts of the world, they have nevertheless been dominated and deprived of their rights as a colonised people. A conceivable way to justify their and analogous groups' demands for restoration of dispossessed land is that they were the first human occupants of a certain territory. Justice is done when the land is given back to them (Lyons 1982: 358). If we accept Nozick's principle of rectification in all of these cases, the descendants of those who were injured some time in history are entitled to material compensation.

The examples illustrate the idea of historical rights put into practice and that indigenous groups have wrongfully lost their land due to illegal transfer. However, as many have pointed out, is it not unrealistic to claim that land should be restored without considering hundreds of years of history and social change? In the case of the American aboriginals, Lyons (Ibid.: 359) suggests that we should mostly take into consideration the fact that the current owners have obtained their land from others through inheritance, purchase or gift, and that there is no direct linkage between those living today and the injustices that occurred some time in the past. In addition, Sher (1981: 6) points out that on its *prima facie* standard of interpretation, moral repair is basically about bringing back a certain good a person would have obtained if a wrong act had not happened. This argument entails the idea that a person who may be entitled to compensation due to historical injustice *has to exist*. If we rely on this version of corrective justice, it is reasonable to argue that ancient wrongs (which concern people who have been dead for ages) do not have the same normative credo as more recent ones do.

It is nevertheless unreasonable to assume that some individuals or groups living today would have enjoyed a higher level of material well-being and better general social life conditions if colonialism had never happened (Malnes 1988: 136). History is certainly crammed with injustice of all sorts that has caused misery for those who were born under and subsequently to it. Wars, robbery and enslavement certainly made a great many European states, trade companies and individuals prosperous compared to those who experienced being conquered and their resources stolen.

Many descendants of those who lived through Western imperialism would perhaps have been better off as well. It is, however, unlikely that we would be able to get a correct historical picture of a right distribution of goods that would have prevailed in the absence of ancient historical injustices. Even if historical injustices have occurred on a large scale in all parts of the world, we would have a problem trying to single out to what extent the descendants of those who suffered these wrong acts would have enjoyed a better life in terms of resources and material wealth without the colonial experience. If we were to succeed in such an assignment we would have to “draw on far more genealogical, causal and counterfactual knowledge than anyone can reasonably be expected to possess” (Sher 1981: 4).

3.3 Forward-looking versus backward-looking reasoning

Since a proper counterfactual approach is difficult to achieve in practical moral reasoning, a forward-looking strategy is usually regarded as being more accountable. Instead of the historical strategy suggested in the freedom thesis, we may say that society or people have a moral responsibility to react against situations that do not produce a good outcome or fulfil certain human needs. For example, if somebody suffers from wrongdoing in the past, our moral concern should then predominantly be interested in what can be done in order to improve the situation now or some time in the future. In many situations, redistribution of resources is then required. This way of thinking about property rights is commonly more cherished than the retrospective inspection of the morality of ownership, and this for good reasons, I believe.

When right and wrong are judged by the consequences of one's achievements, the right thing to do is to decide to act in a way that is intended to serve a purpose better, or at least not worse, than the present alternative. Things that ought to decide moral questions are consequently not, let us say, to defend a suitable material difference between two persons that was established earlier. The question is rather, as Malnes (1988: 141) argues, about how this difference contributes to both persons' well-being at present or in the future. A particular distribution has optimal consequences and is

then just if and only if the consequences are impossible to improve through any form of redistribution.

Future choices

If we rely on normative reasoning on this account we may argue that moral judgement is all about choices. And the only choices we can improve are those in front of us (Waldron 1992: 4). A stubborn confidence in backward-looking justice and absolute rights are therefore hard to defend. If one particular human action or event is unjust, it might be the particular features of this action that are unjust, and any act of that kind would then remain unjust under similar circumstances some other time (Ibid.: 4).

If we condemn something that happened centuries ago, for example theft of land, then we express our moral disbelief about similar thefts going on now or some time the future. To put it in other words, we are facing a possible outcome of what may happen if we do not change our pattern of behaviour. We may argue that this kind of judgement is part of our moral standard – it is part of our moral understanding and helps us evaluate principles that we are already committed to theoretically, as Waldron argues (Ibid.: 5). The past is then something that provides humans with lessons about right and wrong - a test of moral consciousness and human action. Through this notion, ethics is considered to be predominantly concerned with human conditions and results that are attainable now or some time not yet experienced (Ibid.: 5).

3.4 The extended proviso

Let's take a look at Nozick's main arguments again. His deontological theory rests first of all on a presumption that individuals enjoy freedom of action and are protected by rights that no one is allowed to violate. What people get in terms of resources, they get from others as gifts or in exchange for something else. He sees a free society as a system where diverse people control different resources and where

holdings are the results of the free exchange between persons. There is no need, he argues, for redistribution of what has already been properly distributed (Nozick 1974: 150-151).

The fact that Nozick's hero Wilt Chamberlain may end up being a wealthy person is the result of people's individualistic choices to spend money on leisure activities (Ibid.: 161). Redistributing goods that have already been distributed legitimately (in accordance with his three principles), for example, by a fixed pattern or by any form of end-state principles, would trespass on the constraints that are meant to secure human freedom. If society or a state seeks to uphold some form of preferred distributive pattern, it must continually interfere and stop people's transactions and frequently interfere to take resources from those who have attained goods through the choices of others. This mission is, he states, both unrealistic and unjust (Ibid.:163).

Nozick seems to disregard the fact that the needs of others may become pertinent some time in the future. He states that an acquisition is morally sound if the act does not worsen the situation of others in ways that a) hinder anyone the opportunity to improve his or her situation through a particular acquisition of a certain holding or b), hinder anyone the opportunity to use freely, without acquisition, what someone previously could (Nozick 1974: 176).

But if it is the consequences of human conduct that ought to help us solve ethical disputes, and humans' physical needs are the basic criterion, it is likely that it can be claimed that property rights are not something that survive all social changes. Rights of this sort can never be absolute and the legitimacy of ownership is therefore flexible. In regard to the indigenous peoples' land claims in America, 'Saameland' or anywhere else in the world, time and history may have changed customs and brought new expectations and caused new rights to the land that once was used and inhabited by these original occupants (Lyons.: 359).

This resembles an egalitarian objection, or at least thoughts that lean in the direction of social consequences instead of the uncompromising retrospective justification put

forward in Nozick's self-ownership thesis. Native Americans, for example, may have rights to property, but consequences that are due to social changes may entail that resources ought to be shared. A proviso or constraint must then be understood as an extended prerequisite - a constraint that regulates people's rights more drastically than the Nozickean version does.

The island analogy

Consider the following example from Lyons. Imagine that most of the sources of fresh water on an island originate from a huge source that is about to run dry due to ecological changes. Through custom and inheritance each family on the island has controlled their own waterhole for centuries. If all but one of these holes run dry for an indeterminate period of time, it would not be unreasonable to maintain that the inhabitants ought to share what is left of the island's water reserves. The water hole might have to be transferred to common property (Lyons 1982: 371).

What if a party of castaways from a shipwreck were stranded on our island? Would they have any rights to things on the island? One of multifarious answers is that the newcomers ought to have a share in the islanders' resources and that economic and social arrangements should be redistributed in a way which Lyons' island example may demonstrate. Nozick would probably say that the newcomers acquire only such rights as are required to support their bare minimum of needs (Ibid.: 369).

Lyons envisages another situation where the castaways were aggressive people who conquered and deprived the original islanders of their land. As a consequence, the original inhabitants were deprived of their land and forced to live on an isolated part of the island. It is not difficult to imagine that these original islanders could be Native Americans and the stranded strangers European settlers. It is probably beyond doubt that Native Americans have systematically been discriminated against in American society, but their claims are most likely limited to the unjust deprivations that the existing generations have suffered from due to wrongs committed in the past. It is

doubtful, Lyons (Ibid.: 375) argues, that these claims can be grounded on their ancestors' original occupation of the land.

3.5 Needs, persisting injustice and prima facie obligations

One alternative way to justify property rights is to ground such rights on a premise about *human needs*. Instead of insisting that all humans have rights that can be claimed by reference to conditions in the past, we may suggest that human well-being and the satisfaction of various needs should have highest priority among legitimate social aims. Consequently, although time may have caused a new situation where original rights have faded in moral value due to new social circumstances, it is, however, possible to imagine that rights to certain needs may have survived historical change. In some situations historical injustice may endure through time and thereby remains a persisting injustice to those who live now or some time in the future. I shall try to shed light on this thought.

The secular version of Locke's argument discussed earlier is an example of a need-based justification of rights to property. His fundamental premise is to secure human life conditions and peoples the chance to flourish. As Lyons argues, a possible answer in the Native American case could be that the ancestors who were subjugated may have reasonable claims to land and resources and reparation for wrongdoing done to them by a system that has deprived them of a fair share of the attainable goods in a certain territory (Lyons 1982: 373). This reasoning is, however not about corrective justice where the arguments are grounded on a historical or Nozickean approach. The idea of justice is instead justified on grounds that pertain to forthcoming and existing human interests.

Many indigenous societies look upon themselves as a tribe or a community in which the members share a view on common usage of land and resources. Collective claims of this kind may then be regarded as a lasting entity or an institutionalised custom that has survived without reference to the individual members of a group. The descendants of those who experienced wrongdoing may then consider the

dispossession of land or customary rights as a condition that endures through time – as a situation that deprives the contemporary members of the rights to certain needs and material goods. Waldron (1992: 14-15) has categorised this kind of situations as examples of what he denotes as *persisting injustice*.

If we add this idea to the forward-looking alternative suggested above, we may contend that people can have rights that ought to be corrected if others' interests and needs are not endangered. The decisive matter is primarily what effect an accepted acquisition would have on the prospects and life conditions of other people. We may then argue that an initial entitlement can be maintained as long as the social conditions make it sound. Rights to property must thus always bend to the needs and interests of human beings. It is not an absolute normative category that can be justified solely on a claim, as uncompromising deontologists may argue, that humans have rights. Instead we ought to judge its moral worth by the consequences it creates for those living now and for generations to come.

If this standpoint is sound, we may say that people ought to have some kind of *prima facie obligations* towards such rights, but that this duty may necessarily be validly overridden if more severe, competing social demands so require (Becauchamp 1991: 325). The idea of persisting injustice described above can thus be transferred to a way of reasoning where indigenous peoples' rights to dispossessed land and resources is an injustice that pertains to contemporary people's right to be a part of a certain culture or community. I shall extend the discussion on this kind of normative reasoning in the next chapter.

3.6 Summary

I shall summarise my objection against historical rights and sketch an alternative view in regard to historical injustice. The Nozickean counterfactual approach to rectification suggests that someone living today may be required a transfer of resources in order to bring the present state of affairs nearer to what would hypothetically be the case if a certain injustice had not happened. The problem is, as I

emphasise above, that we are unable to validate what hypothetically would have been the case if something that occurred had never happened.

Claims based on corrective justice are thus doubtful. I also suggest that human needs and people's life conditions are what ought to regulate the justificatory force of property rights. If the goal of political theory is to support people's needs and provide a more equal distribution of goods and resources, which I think it should, a forward-looking approach is more desirable than a historical strategy. A forward-looking concept of justice entails that Nozick's version of Locke's proviso ought to be prolonged and that the legitimacy of long-established ownership may fade if circumstances change.

Certain historical grievances may then lose their corrective value. However, we cannot conclude that *all* historical wrongdoing is without moral worth today. As I have just argued, in some situations the two approaches somewhat overlap. We may argue that an injustice in the past may create long-lasting or enduring effects that concern the needs of those living now or some time yet to come. Let us assume that indigenous groups have been deprived of the chance to attain (or maintain) a fair share of the overall resources and territory in an area or state. One alternative, if the distributive circumstances allow it, is then to argue that existing members of such groups have legitimate claims to land and resources because this satisfies the existing members' physical needs and constitutes a part of their well-being *today*.

In the next chapter I shall discuss a revised approach to property rights that is connected to the idea of people's social needs and to claims that pertain to ideas concerning people's right to cultural self-determination. A key element in this discussion is how culture can be included as a decisive part of human needs and well-being and thereby a constitutive part of a *prima facie* justification of rights to land and resources.

4. On Culture And Justification of Collective Rights To Land and Resources

4.1 Property rights and human well-being

If we want to succeed in our search for an acceptable justification of collective ownership of land and resources, we have to find out what kind of human interests concern our ethical reasoning in regard to such rights and how we ought to respond to these interests. Major premises in the forthcoming argument are that collective property rights must bend to present and future human needs. In addition such rights are considered to be part of a broader claim of people's right to culture. My aim is therefore to discuss a normative standpoint where property is assumed to constitute some valued state of affairs in individuals' lives as members of a cultural community. Property rights are interpreted as a part of people's particularistic interest or aspirations that derive from a person's empirically conditioned desires (Larmore 197: 132).

This prospective approach can in general be defined in a way that follows Joseph Raz' (1986. 166) definition of a right: person X has a right if and only if X can have rights and only if an aspect of X's well-being or interest is an adequate reason for holding other persons to be under a duty. In addition we may claim that individuals are capable of having rights if and only if well-being is of ultimate value (Ibid.: 166).

It is beyond my ambition to reach an all-embracing theory of property rights and their justificatory force in moral theory. The objective of this chapter is primarily to discuss the relation between human well-being and needs and cultural rights and to search for sound forward-looking normative principles of how to justify (on a *prima facie* basis) indigenous peoples' collective claims of territorial autonomy and natural resources.

I shall give attention to the alternative normative explanation for justifying ownership of land that was presented in the introductory section: do contemporary members of indigenous communities have sound claims to land and resources because they have special needs that are connected to a certain culture? Or to put it in a different way, are there good reasons to grant members of such groups rights that protect their culture, their ancestral homelands and their customary economical livelihood? The inquiry in this chapter will hopefully give a more reliable account of indigenous peoples' rights than the historical strategy expounded in the first part of this thesis. I shall begin by looking at the relationship between needs and human well-being.

4.2 Objective and subjective goods

What is the essence of a good life? Is it possible to define some needs as culturally specified and, at the same time, contend that some goods are universal to all humans and that there is objective reasons exist to accept such values? How can we possibly define something as complex as human well-being? First of all, we shall concern ourselves with individual well-being. When we consider the relative degree of an individual's contentment with life we may argue that it is the individual's life as a whole that matters. People's understanding of what it means to live well is to a large extent related to how they manage to satisfy basic and more secondary human goods and needs.

In general, we can say that well-being is a kind of evaluation of a person's life condition, the satisfaction of the person's biological needs and success or failure in achieving personal goals as they are or will be some time in the future. It is also reasonable to assume that more pervasive interests are more important in this sense than less pervasive ones (Raz 1986: 289-292). What people need in their lives may be as different as chalk and cheese. Some may need strong medical treatment to stay alive and function, while others are dependent on a wheel chair. Some crave huge amounts of money to attain expensive material goods to live out an extravagant lifestyle while others have more humble demands.

If people's aims can be ranked by their moral importance, which I believe they can to some extent, some general needs can be considered more significant than others when we aim to establish just social institutions and a theory of rights based on needs. This ranking of needs entails a classification of goals and projects in accordance with their overall human importance. The variety of individuals' needs and goals can be categorised as human goods. Charles Larmore (1987: 139) distinguishes four different things that might illustrate a ranked division of the goods that can contribute to human well-being. Generally speaking these categories could be:

1. the avoidance of pain,
2. the satisfaction of needs,
3. people's short-term preferences, and
4. whatever fulfils people's long-term preferences (projects and commitments).

Objective goods and universal duties

Some human necessities can be regarded as immediate to all living creatures. These goods represent basic needs, or course-of-life goods that are obligatory for the most basic projects in a human's life. If these goods are endangered or people perceive displeasure by not being able to fulfil these types of goods or needs, we can say that they are going through some kind of harm that ought to be avoided (Wolf 1998: 336). Biological or physical needs, for example, have been considered more or less basic and pertain roughly to determined aspects of general human existence. We may have different biological needs, or experience need differently, but many such interests are determined aspects of all human beings to a certain degree. If I did not get enough food or sleep I would probably get tired and lose the ability to write this chapter, and if I were infected with a life-threatening disease, I would be in need of proper medical care. My point is that a person is better off when that person is in good health and is well fed, regardless of whether these needs are a part of a person's private goals or not (Raz 1986: 290).

It is also reasonable to assume that the avoidance of pain is something that most people have reason to avoid and that well-being, as a general concept, is something humans have reason to pursue. To be tortured, subjected to humiliation, threatened with genocide or to be trapped in poverty are examples of great evils for all human beings. For most people, it is obligatory to seek protection from these kinds of sufferings. Consequently, it would be reasonable to argue that these values should be applied and supported as universal or objective obligations that we should all endorse and to which we should attach importance.

Larmore (Ibid.: 140) looks upon objective goods as needs or “desires that are ours not in virtue of having adopted them, but rather in virtue of being the sort of beings we all are”. Such common interests may then be recognised as things that are necessary for us to have if we are to live adequately decent lives. It can then be argued that these common features of a shared human condition entail that there are certain things that we all need regardless of cultural, particularistic interests or social differences.

Consequently, certain rights would be appropriate and necessary as a means used to protect and promote these kinds of universal and objective goods and needs. In accordance with the definition of rights outlined above, we can then state that certain objective goods concern people’s life conditions and, thereby, their overall perception of having a good life. It would then be morally important to protect these goods on a large scale when they clash with more partial or personal perceptions of the good life (Ibid.: 132). The satisfaction or protection of objective goods can thus be important reasons for establishing rights and for holding other persons (or groups, states etc.) under a duty. The universal human right not to be tortured - where the intention is to protect all individuals against cruel and inhumane treatment – may serve as an example in this respect.

Subjective goods and particularistic duties

In addition to physically determined needs and objective goods I shall argue that people adapt and pursue goals and concepts of the good life that go beyond the sheer satisfaction of our most essential needs and what we may have objective reasons to accept as universal human interests. This second category is presumed to include what people are more or less able to choose, goods that normatively would rank below the more general interest outlined above. Larmore (1987: 140) identifies such values as subjective goods, as valuable, partial ends that somewhat reach further than is absolutely necessary but still contribute to human flourishing in important ways.

As the distinction above shows, a subjective good is recognised as something which may satisfy someone's short- or long-term preferences and commitments (Ibid.: 142). Religious faith, personal bonds like friendship and family, various cultural desires and a shared concept of collective ownership of land can serve as examples of these personal aspects of morality. Subjective goods are, in other words, the empirically conditioned interests and values we have as a result of our participation in some concrete way of life or institution (Ibid.: 132).

Larmore (Ibid.: 132) contends that there are particularistic moral duties connected to these goods and that we all, under certain conditions, may be allowed to pursue a principle of *moral partiality* and thereby "show an overriding concern for the interests of those who stand to us in some particular relation of affection" (Ibid.: 132). In many cases these particularistic interests are superseded by more high-ranking moral principles such as the principle of consequentialism. If crucial objective goods are at stake - let us say thousands of people are starving and are in immense need of social assistance - it would be wrong to insist on these subjective interests. I shall return to these questions of decision when I portray the idea of *moral judgement* in the final section. Until then we may contend that the fulfilment of people's subjective interests may be sound and ought to be promoted as long as the overall social circumstances allow this.

My point is that the completion and availability of many of these particularistic and optional long- and short-term preferences constitute fundamental elements in an

individual's capacity for welfare and the ability to live decent and flourishing lives. Subjective goods are thus part of that which constitutes human freedom. They enable people to make a variety of choices in regard to their needs. If this reasoning is true, we may argue that indigenous peoples' rights to land and resources can be deduced, at least from a *prima facie* point of view, from a premise which is grounded on these particularistic interests. In other words, the right to collective ownership may then be deduced from the particular interest a person may have in belonging to a certain cultural community. I shall proceed with a discussion of the approvability of this kind of justification.

4.3 Cultural vulnerability and indigenous peoples' collective claims to land

Indigenous people have commonly been considered as a subset of the broader category of national minorities or stateless nations (like the Catalans in Spain or the Scots in the UK). Like national minorities, many indigenous groups have struggled to resist incorporation into larger nations or states and instead endeavoured to establish some form of self-determination or specific collective rights to ownership of land and resources. These kinds of claims do not necessarily entail demands of succession or the establishment of independent states but rather some form of autonomy or collective self-rule within larger political units like states (Kymlicka 2001: 121-129).

As Tully's criticism of Locke in chapter three shows, I think it is important to bear in mind that many indigenous people view themselves as a part of a community where land is not perceived as something that pertains to state territory, private ownership or something that is recognisable as individual rights. Instead of a private concept of land, they share an understanding of a joint closeness to the territory that have inherited and occupied in common for generations. Land and natural resources are considered as collective goods, and the members of such traditional societies view their relationship with these goods as central, both to their individual well-being and to the contentment of the group as a whole (Johnston 1995:193).

Another common feature of such groups is that they consider themselves as trustees of a particular territory for future generations. Land is part of a complex understanding that involves the satisfaction of both objective and subjective goods, i.e. their basic needs and projects and commitments such as cultural traditions. According to Johnston (Ibid.: 194), history has shown that there is an evident relationship between indigenous peoples' dispossession of their homeland and their prosperity to live within their traditional culture and social environment. In addition to claims about cultural self-preservation, people who belong to such communities have demanded that lost land be returned to the rightful owners.

The vulnerability argument

As explained in the introductory chapter, some have argued that indigenous peoples adhere to a way of life that is incommensurable or radically different from what may be called "modern life". Theorists like Will Kymlicka (2001: 121-129), for example, believe that these kinds of social communities may have good reasons to claim special treatment in terms of rights which protects their traditional ways of life, their traditional homelands and their usufruct of natural resources (Ibid.: 121-129).

Regardless of the similarities with other minority groups, such as stateless nations, Kymlicka thinks it is reasonable to distinguish indigenous peoples' need for special treatment because of their general cultural "otherness" (Ibid.: 129) compared to modern societies. One of the main reasons for protecting their interests and needs is not based on a model of correcting historical injustice or mistreatment in the past, but rather on arguments about the preservation of the present and forthcoming interests of such groups. He rests this thought on the argument that indigenous peoples are in a particularly precarious situation compared to other minorities. Their need for protection of their culture is stronger than similar needs experienced by other cultural minorities (Ibid.: 129 and Weigård 2004: 9).

4.4 Community and Kymlicka's view of the social world

The right to culture

Some have suggested that the kind of vulnerability argument suggested above can be grounded on a more general principle where the right to culture is considered to be the deepest premise. In the following two sections I shall discuss in more detail how culture can be considered an important moral issue in regard to indigenous peoples' well-being and ability to achieve the satisfaction of what I have categorised as subjective goods. This question involves a more thorough debate about cultural membership in moral theory in general. The discussion of cultural membership is in part a contribution to the debate between liberals and communitarians, but as my argumentation will clarify at the end, it is possible to unite these two contested standpoints of morality and the social world.

The idea of individualism

Modern liberals have commonly assumed that a person's well-being consists of the satisfaction of a variety of needs and the successful pursuit of self-chosen subjective goods and relationships. They have stressed such things as the importance of each individual's opportunity to achieve a life in accordance with a certain life-plan and a concept of the good and that a person's rights are the liberties and protections that are needed to fulfil these goals (Waldron 1995: 94). These elements are constitutive parts of human freedom and of that which I have recognised as autonomy. By this view, personal autonomy is considered a decisive and dominant part of a person's ability to achieve well-being. We may then say that a person is autonomous if he or she has the ability to act as an individual and to be a part author of his or her life. An autonomous person must acknowledge that different choices might have considerable and enduring effects on life. For example, a person can decide to live a life in solitude or to resist long-term commitments to a certain community and perhaps be happy with this condition.

Autonomy, at least in the sense described here, involves a person's opportunity to live differently from the way he does and be aware of the fact that attainable, alternative ways of life exist. Someone's choice must also be free from coercion and manipulation from others or by social institutions such as states (Raz 1986: 369-375). As Raz (Ibid.: 377) argues, a person whose every decision can be traced back to the coercive actions of others, or who is for any reasons paralysed or mentally unable to take advantage of the options that are offered, is not an autonomous person. The autonomous person is then as such the kind of person who is able to decide a large extent of his own life. It may then be reasonable to argue that autonomy requires many morally acceptable options being available (Ibid.: 378).

Kymlicka's theory on freedom and people's need of communal belonging

As a contrast to the somewhat high-minded ideal of liberal individualism, many theorists claim that human freedom at large, and thereby also people's sense of well-being, an ability to pursue what I have established as basic needs as well as people's short- and long-term commitments and preferences, depends on people's membership in a particular cultural society. The types of communities that have usually been associated with this approach are ethnic groups or nations, i.e., a particular group of people who share a heritage of customs, rituals, language and collective memories. These communities share a way of life that includes a common history and a shared inherited homeland (Waldron: 1995: 96).

The conservative approach put forward by theorists such as John Gray (1993: 125) carries well-known ideas of this sort. He states that humans are by and large forced to live their lives in accordance with local traditions and that any justification of rights or ideas of freedom is valuable and meaningful only when evaluated against a common cultural background (Ibid.: 125). If humans are to flourish, he argues, they need a home and a settled identity that is grounded in common practices and traditions.

Kymlicka shares Gray's consideration about humans' needing cultural belonging. In his book, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Kymlicka seeks to unite traditional liberal values like equality and freedom with the value of community. His approach regarding the rights of what he calls cultural and national minorities rests on an idea where he claims that the value of freedom of choice depends on specific cultural preconditions and that cultural membership must be incorporated into liberal principles. If an individual is to be regarded as free to decide the sort of life one finds valuable, he or she must be part of a social community, preferably a national one.

His major normative justification of cultural rights are in short based on an argument which insists on individuals needing to belong to their "societal cultures" (Ibid.: 76) and that people's freedom depends on everyone's access to this social background. He believes that cultural affiliations belong to the category of what Rawls has established as social primary goods (Kymlicka 1989: 177-178). The members of such communities belong within certain territorial homelands and are commonly identified as a culture or a people. These national cultures are valuable not in and of themselves, he argues, but rather because it is only by having access to one's culture that makes an individual able to decide on a range of meaningful options (Ibid.: 83).

Culture as an epistemological requirement

Societal or national cultures are understood as communities with a shared vocabulary, religious practices, education systems, and a variety of social, economic and political practices. Kymlicka (Ibid.: 42) argues that such social units are usually recognised as national groups and historical communities. He thinks that a common language, since it establishes communicative conventions, is a decisive matter for people's ability to understand each other. The language we share with others enables us to understand the social practices and customs that belong to our culture, and individual's opportunities to choose and to change their opinions about who they are and who they want to be, require that people belong to such communities.

Kymlicka (Ibid.: 83) points to views by Ronald Dworkin when he urges the need to preserve cultures. Since there are no guarantees that cultures will continue to exist, we must protect them if they are threatened with debasement or decay. People's availability of meaningful options requires an admission to societal cultures and, like Gray, he insists on people's need to understand the history and the general cultural traditions that embody such societies (Ibid.: 83).

Equality

He argues that the interests or societal cultures of majority cultures are more or less guaranteed by most liberal states, while the cultures of minorities, including those existing alongside other cultures within multicultural states, face the constant risk of disintegration and extinction. Political and social circumstances then give us unequal opportunities to hold on to cultural practices that make us who we are. The equality-argument for minority rights is that members of minority cultures, in order to attain a right to culture and to achieve meaningful options on equal terms with those who belong to the majority group, should be given special treatment in terms of rights that apply only to minorities and not to the majority group of citizens in a state. National minorities, and presumably also indigenous groups, should therefore be treated unequally in order to gain equality in terms of cultural access (Kymlicka 1995: 108-115, Weigård 2004: 6).

4.5 Criticism and discussion of Kymlicka's justification

Kymlicka seems to be convinced that people's access to their societal or national culture is a minimal requirement if modern liberal goals like equality of rights and opportunities are to be realised (Ibid.: 42). Without membership in a culture, people would lack the perspectives that are necessary for their ability to make meaningful choices. Cultural or national belonging is then understood as a precondition for people's ability to act as rational creatures. Culture is thus regarded as an

epistemological precondition. Personal choice is then due to what is within reach from the standpoint of individuals' communal and cultural experiences.

But is it true that an individual's ability to perceive the good life always depends on close relationships to the culture one is brought up in, or to the people and community which share one's language or history, faith or religious affiliations? Is a profound relationship with what Kymlicka calls societal cultures something we all need in order to make good judgement of the social world?

Waldron (Ibid.: 105) is sceptical about Kymlicka and others' assumptions about people's dependence on one specific, original culture or community. He argues that those who endorse social units, such as nations, as normative valuable ends are probably right when they claim that the modern concept of individualism is a cultural concept that belongs to a certain social and historical context. But in his reply to theorists like Charles Taylor and Kymlicka, he argues that this kind of invented perception counts for community as well. Communities, or the idea that land and political borders naturally ought to coincide with people's ethnic and cultural bonds are, as he paraphrases Benedict Anderson, imagined (Ibid.: 105), and no more natural than ideas of individualism. He is nevertheless confident about the idea that choices are made in cultural contexts which enable people to attain meaningful lives (Ibid.: 108).

Waldron's main argument is that justice must look beyond national claims and instead focus on the world at large. Nobody is unaffected by what happens outside their national borders. No human life is complete, as he puts it, "without an account of our dependence on larger social and political structures that goes far beyond the particular community with which we pretend to identify ourselves" (Ibid.: 104). This is somewhat contradictory to Kymlicka who believes that we all choose from different practices that are part of our social surroundings. The way people view and evaluate any kind of social action is first of all dependent of what kind of meaning this action conveys in the community to which they belong (Kymlicka 1995: 80-81).

I think there are good reasons to be cautious about this generalisation about cultural permanence. As Waldron's (Ibid.: 106) objections elucidate, meaningful choices are usually being committed in a cultural context but it is in any case an exaggeration to conclude that this fact calls for the existence of *one* particular cultural framework. Meaningful options may instead derive from a variety of cultural sources and people may (as Kymlicka also admits) adjust the bonds to the society in which they are brought up. Some people decide for example to leave their traditional church or abandon Christianity and instead devote themselves to another religion or go for secular values.

Cultural evaluation

Let us take a closer look at one of Waldron's examples when he discusses Kymlicka's prerequisite for cultural evaluation. When people judge and evaluate their own society they are making a comparison. A person can, for example, decide on his or her cultural ideals and who he or she wants to be by comparing different alternative roles and values. This evaluation is, according to Kymlicka, dependent on a genuine, original and secured culture. When, for example, a young man evaluates the status of the role of elder males in his traditional, patriarchal society he may want to find out whether this is something to which he wishes to aspire. In Kymlicka's eyes the man would probably be dependent on a secured cultural background to make this comparison (Ibid.: 109).

But to insist on preservation and that a culture must be protected at all cost is, according to Waldron (Ibid.: 109) to "insulate it from the very forces and tendencies that allows it to operate in a context of genuine choice". If we accept this argument we can argue that cultures are vulnerable to evaluations – they are dynamic and changeable and have been so since the dawn of human social and cultural organisation (this knowledge counts for the culture which is being evaluated as well). The young man in the example above can only make a meaningful comparison and evaluation of the value of gender roles in a context where his own community is, and

has always been, vulnerable from pressure and inspiration from the outside world (Ibid.: 109).

Humans' ability to choose their national or cultural ties or to evaluate their social environment is, consequently, not confined to a "shared vocabulary" (Kymlicka 1995: 83) or to some ideas about the inevitability of people's cultural ties. If we rely on Waldron's criticism, we may perhaps argue that we do not need what Kymlicka denotes as "a rich and secure cultural structure" to be able to make rational choices (Ibid.: 106). The nature of cultures are that they are not everlasting – they rise and whither away or blend with other cultures.

Consequently, to defend a normative principle, the ultimate goal of which is to preserve a certain culture, becomes an artificial task. Preservation, as Waldron (109-110) replies, is like taking a snapshot version of the world at a certain time in history and insisting that this picture must persist at all cost for eternity.

A conclusion from the arguments above can be wound up in the following way. People need a cultural environment but their capacity for making meaningful, rational choices is not restricted to nor rests solely on our affiliations towards *one particular social environment*. Our empirical and cultural inspirations stem instead from a variety of cultural sources. Consequently, although we all need context to create meaning, we do not need inflexible and permanent social backgrounds.

4.6 Culture as institutional stability and as a subjective good

I am willing to agree with Waldron that we presumably do not need one single cultural perspective as our epistemological tool to structure all our choices and preferences. Despite the fact that most people prefer to look upon themselves as Norwegians, as members of a Saami community or the Basque national movement, national commitments are hardly an innate and unconditional precondition for their ability to perform rational evaluations. We cannot distance ourselves totally from our cultural context. We all have inherited viewpoints that we carry with us when we try

to make sense of what is going on in the world around us. But to conclude that culture is the essence of all our abilities to make rational choices is, I believe, a misguided exaggeration. I shall leave this epistemological discussion and proceed with a somewhat moderated account of cultural values in normative theory.

A perhaps more accommodating posture than a claim of epistemological necessity, or at the other end, a total dismantling of people's need of culture, is that we can delineate a compromise where both individual autonomy and society are considered as important aspects of a person's well-being and moral life. I shall portray an account for cultural rights and property where the justification is based on two corresponding arguments. In the first argument, culture is appraised as a kind of particularistic good where it is considered an important part of people's ability to predict and decide their lives within social institutions. The second argument is that culture, and thereby collective rights to property, is (at least to some extent) a subjective good or an empirically desired choice.

The expectancy argument

We all need some sort of background in order to understand our choices in a context that makes sense. We need social and political predictability and the opportunity to fulfil expected goals within institutions and social arrangements that we recognise together with other people. Culture, in all its varying occurrences, is to some extent a part of this background. It concerns our ability to express our preferences about the kind of person we would like to be and the way of life we would like to live in the future. A full definition of culture in this sense - its comprehensive impact on people's needs and well-being - is beyond the scope of the discussion in this section. For our purpose here we can delineate its meaning, as suggested by Andreas Føllesdal (2004: 4) as "people's shared beliefs and rule-governed patterns of behaviour". In this view, it represents a part of people's expectations and social commitments and not, I think, an extensive and uncompromising part of rationality as suggested by Kymlicka.

The rules and institutions that we are committed to and the culture that surrounds most people, according to Føllesdal (Ibid.: 5) represent an important part of individuals' interest and ability to anticipate their lives. As a form of rule-governed behaviour, cultural institutions shape our expectations about what we can do and cannot do with our lives. It structures different options that are available and helps individuals to organise their attainments and needs. Føllesdal (Ibid.: 5) endorses the argument for cultural rights because he regards institutional stability as a vital part of an individual's ability to make and pursue autonomous life plans. A second aspect in regard to the expectancy argument is that people should be secured the ability to decide the degree and speed of cultural change. Even if cultural alteration may be a rather unavoidable feature of the social world, Føllesdal (Ibid.: 5) identifies, and for the right reasons I believe, that it is important not to violate members of indigenous communities' sense of control and dignity when these changes occur.

We must give leeway to the idea that different ways of handling social changes exist (in terms of new economic demands, technological developments etc.). Waldron's concern for universal benevolence is praiseworthy and a common, objective good that I think we all ought to appreciate. On the other hand, if we insist too strongly on this ideal as a rule of thumb, I believe we are making unrealistic demands that will encroach too heavily on the traditional way of life of many societies around the world. This last argument is hardly supporting cultural conservatism, but more a way of identifying facts and realities in life.

We are thus morally obligated, I believe, to accept that when members of indigenous communities face new social demands they must be given the opportunity to revise their plans and adjust to societies' shifting conditions in accordance with their own concept of the good life. As Føllesdal puts it: "This allocation of control increases the likelihood that changes are expected, and it may minimise conflicts with existing, valued expectations" (Ibid.: 5). If we are willing to accept this, we may be more prepared to meet the cultural clashes that are unavoidable when people who are

marginalised by the interests of the greater part within a larger society are to negotiate on land and resources.

The subjective good argument

In addition to the appeal to safeguard people's expectations about life, we can argue that the kind of social institutions people in the end ought to be a part of is in the end a matter of subjective choices and partial decisions. In other words, the right to collective ownership may then be deduced from the particular interest a person may have in belonging to a certain cultural community. This second argument is sustained by Larmore's insight on partial values. Yael Tamir's (1995) thoughts concerning cultural membership and individual freedom help to shed light on the idea of culture as a type of subjective good. I shall present some of Tamir's viewpoints as they appear in her book *National Liberalism*.

Tamir (Ibid.: 35) aims to combine ideas of community with a belief in liberal autonomy. Why should people's interest in protecting their identity and national culture be respected? Individuals view the protection of a particular cultural or national identity as an important feature of their well-being. This view is in line with the justification of rights given at the beginning of this chapter. Culture may thus be an interest that justifies, on a *prima facie* basis, holding other people under a duty. By this token, collective ownership of land and resources can be regarded as a part of people's partial interests – as a subjective good that belongs to our culture and our personal commitments and choices.

The contextual individual

In the modern world most individuals attain membership to cultures like nations or states by being born. Membership is then, as Tamir (1995: 124) rightly argues, a matter of destiny rather than choice. However, it is reasonable to claim that humans are able to decide to stay or leave these kinds of associations at a later time in life. People's communal commitments are, to paraphrase Tamir (1993: 37), not a prison, and belonging to a certain nation is not shackles, but something that is possible to

revise through conduct that corresponds with much of what I have written above. Individuals should not, she argues, “be seen as encumbered by duties imposed on them by history and their faith, but be free to adhere to cultures and religion of their choice” (Ibid.: 39).

One reason to appreciate cultural as a partial or subjective value is because it provides people with real options about who they want to be. Tamir (Ibid.: 36) describes people as contextual individuals. A person is born with a certain cultural identity and is able to reflect on and evaluate his or her concept of the good life. This ability also concerns humans’ national and cultural affiliations. Though individuals are reflective and autonomous beings, she claims that the realisation of people’s choices in regard to communal ties requires a social environment that allows them to become what she denotes as *strong evaluators*. However, when people have chosen a kind of social unity, their membership in this community might impose certain duties on the members. When people, for example, have expressed a willingness to be a part of a particular kind of religious society, they have at the same time showed a kind of devotion to that particular practice (Ibid.: 39).

The point here is that Tamir accepts a combined approach of individuality and community as two somewhat equally important features of people’s capacity for moral and rational evaluation. As argued above, a major reason to accept this combination as a decisive normative standpoint is that many individuals view their cultural bonds or the national identity they have chosen as an important aspect of their personal well-being. Moreover, it is important to acknowledge that individuals will be unable to exercise their right to make decisions in regard to their cultural affiliations if they do not have a wide range of cultures from which to choose. This seems to coincide with what I have already argued. Though we decide to live without access to the culture with which we are brought up, we all need some sort of culture if we are to flourish – a context which enables us to create meaningful options. People’s ability to reflect critically on the society they belong to requires something to

compare it with and this assessment is only meaningful in a world where valuable alternatives exist.

Some might prefer to view themselves as a person who corresponds with Waldron's view of the cosmopolitan individual – a person whose view of the good life is drawn from allegiances “here, there, and everywhere” and who belongs to a variety of different and, perhaps, contrasting communal commitments (Waldron 1995: 110). Others, for example members of indigenous communities, may prefer to live a traditional way of life that corresponds to a collective concept of life in a shared territorial environment. The justification of cultural pluralism, according to Tamir (Ibid.: 30) is not valuable merely because it promotes alternative life styles. Another notable reason is because it makes us capable of improving and reflecting on our own life and culture.

4.7 The right to ownership of land and resources

When we discuss indigenous people's collective claims for territory and resources we must acknowledge that these demands are not necessarily the same as demands for political sovereignty. We must also bear in mind that not all societies are modern, industrialised states that rest on a market economy or a political system of states. Instead, we have to realise that several forms of the good life exist and that people need natural resources and land differently. This is part of a larger perspective where we accept that a variety of different particularistic values and (changeable) cultural conceptions of the good life exist.

If we base a conclusion on the cultural principles suggested above, we can argue that indigenous groups may have good reasons, at least from a *prima facie* point of view, to attain some form of collective property rights. These kinds of rights can be grounded on a twofold model where culture is considered both a subjective good and as a part of humans' expectations about life. Both of these arguments represent human interest that may be, as suggested by Joseph Raz, adequate reasons to hold other peoples under a duty.

4.8 Some thoughts on moral judgement

As I hope my argumentation has elucidated, I regard cultural rights as a part of human well-being. We all need resources and freedom to accomplish our quest for satisfying various goods and basic needs. Some of these goods may be deeply associated with one particular culture or a way of life that is practiced among a distinct group of people. We cannot generalise that all people's chances to succeed and to flourish, as Kymlicka seems to believe, are tied to the societal culture in which one is brought up. Neither can we separate ourselves from a cultural context.

What I do recognise is that cultural commitments may be more crucial to some people than to others, and that individuals in certain societies or cultures tend to be more attached to their traditional and historical bonds than others. Consequently, we may have a moral duty to respect that cultural minorities need to adjust their goals at a chosen speed and within institutions that people feel at home and safe with.

Individuals should not only have the right to choose the community they want to belong to, but they should be able to decide by themselves the meaning of the culture they want to be a part of. As both autonomous beings and cultural creatures humans are to be the ones who decide the course of their lives.

The various sources of morality

As argued in chapter three, normative reasoning is, I think, first and foremost a matter that concerns human choices - choices that concern human lives and behaviour now or in some time to come. However, reality provokes situations when we are forced to make choices between different moral obligations. The division of human goods makes it clear that there is more to morality than our personal goals and particularistic interests. In addition to our desire to satisfy subjective goods we all share an interest in objective goods and what I have categorised as universal values. As I have previously explained, some human necessities are more or less immediate to all human beings; they are to be valued as obligatory goods that all people need to be able to accomplish the most basic projects in life. To avoid starvation or brutal

humiliation, to be able to get enough food or medical care when needed are examples of such needs or more or less objective goods.

In the real world these universal human interests are destined to come to blows with people's personal interests and perception of a valuable life. In other words, we cannot escape the fact that life causes conflicts that may not be easily solved.

Sometimes we are also required to make tragic choices (Larmore 1987: 132). We may, for example, be forced to decide whether an indigenous group should be allowed to own a piece of land or whether the concern for other more common interests should prevail. These kinds of realistic concerns cause inevitable difficulties when we try to establish one monolithic foundation of moral reasoning.

Consequently, we may be forced to acknowledge that various sources of how to decide right and wrong exist.

Larmore (Ibid.: 132) seems to be sure about three major principles that may be at odds. The *principle of partiality* goes well with what I have categorised as subjective goods and our particularistic duties. This principle pertains to the kind of duties we may have towards friends and the commitments we may have to certain institutions or some concrete way of life. I have tried to demonstrate how rights to particular cultural practices like collective ownership of land can be justified by the principle of partiality.

Another major source of morality concerns benevolence, or what I have formerly categorised, as the *principle of consequentialism*. As I have already demonstrated several times, this principle requires us to always aim at doing whatever will produce the most good or the least evil or, in other words, what we have reason to believe will be the best overall result. The *principle of deontology*, on the other hand, requires us never to do things of a certain kind to other people (like kill an innocent person or break a promise) (Ibid.: 132).

Judgement and the principle of “ought implies can”

When we make an effort to solve practical normative questions like the ones examined in this thesis; how are we to decide between various interests and principles? The big question would seem to be: how do we come to a decision and choose between these various sources of normative explanation?

One answer is that some cases may be impossible to solve. As I explained in the introduction (1.7), the realities of life will always provide us with hard, theoretical cases. We may be confronted with cases of great uncertainty - cases that can be sorted out as ethical dilemmas or objects of inescapable rational disagreement. Under such conditions we may have to surrender in our quest for more persuasive, rational explanations. Our ability to judge between right and wrong may thus be subjected to a principle known as “ought implies can” (Ibid.: 149). This principle can be regarded as a kind of rule where our virtuous acts are limited by our mental and physical ability to perform a certain duty.

In other situations we have to put our faith in our capability of *moral judgement*. Judgement and the above principle can be considered as somewhat indeterminate supplements to our somewhat limited theoretical knowledge of morality (Ibid.: 19). Moral judgement is here understood as a way to go beyond the sheer application of moral rules alone (as held by Aristotle). One way to describe this rather indistinct ability is as a kind of supplementary, non-theoretical way to sort out what to do in a particular situation. As Larmore (Ibid: 5) puts it, the rules and the duties connected to various theories cannot always, “determine whether in particular these duties have a claim on what we should do and, if so, what action would satisfy these duties”.

Numbers count

Some guidelines may, however, be possible to follow. The principle of consequentialism becomes important to uphold as a overriding rule if the protection of people’s objective goods are threatened (Ibid.. 148). I have already provided a thorough examination of conditions where the interests of the many ought to predominate over the interests of the few. The example given by Lyons in chapter

three is an example: Natives on an island may have inherited customary rights to own waterholes on their inherited territory. However, if the social conditions change due to the arrival of needy newcomers, or all but one of the waterholes run dry, the original owners have a duty to share their resources with others. The use of moral judgement may also be appropriate if our concern for general welfare is not urgent. It seems obvious that cultural preferences become hard to defend if other more basic needs are under severe pressure and people outside a given community are suffering from a lack of resources or great social misery. Indigenous peoples' customary practices and conceptions of the good life must nevertheless be well thought-out and applied as vital elements to forthcoming political compromises. They should, as far as it is practically and morally defensible, be given the opportunity and leeway to have their particularistic interests protected.

4.9 Summary

I will now wind up the arguments presented in this chapter. I have argued that justification of rights in general must derive from people's physical needs because it protects different aspects of human well-being. These interests can sometimes be regarded as an adequate reason for holding other persons under a duty. I have also made a twofold division of valuable goods— the *objective* ones that correspond to what we ought to promote as universal values and, secondly, the particularistic interests that pertain to our *subjective* desires. Ownership of land and natural resources can be considered a subjective good. Collective property rights are thereby understood as particularistic interests that become realisable in specific social and cultural environments.

My major concern has then been to show how indigenous peoples' property rights can be derived from a more general justification of people's right to belong to a particular culture. I have discussed Will Kymlicka's equality argument for grounding this kind of right. If people are to be able to interpret and understand their surroundings, he believes they need access to a shared language and various

communal practices. Having no membership in an inherited culture implies that people would lack the epistemological preconditions that are necessary for humans' ability to make meaningful and rational choices.

I am unconvinced about Kymlicka's reasoning on these matters and have therefore suggested a more moderate defence of cultural rights. The right to be a part of a culture or community does not have to be grounded on principles that aim at preservation because of people's need of belonging to *one* societal culture. Such rights can instead be justified by two alternative principles:

- 1) People should have a right to culture because it belongs to the category of subjective goods and the partial interests that pertain to human well-being.
- 2) People need culture because it shapes the expectations individuals have about what they can do and cannot do with their lives and because it structures different options that are available. Another aspect of this principle is that people need the ability to control and choose the speed and degree of cultural changes.

If we attach these principles to Raz' concept of rights outlined in the beginning of this chapter, we can state that collective ownership of land and resources is a kind of cultural practice that counts as a sufficient reason to put some other human beings under a (*prima facie*) duty. Despite the collective aspect of such rights its justification, I believe, is based on ethical individualism. When we decide whether an indigenous group ought to have rights to a piece of land, we must evaluate this particularistic claim together with the obligations we may have towards general benevolence and other people's well-being, especially the kinds of interests that concern objective goods. This task may appear to involve theoretical difficulties and dilemmas and we may then have to rely on our ability to perform moral judgement.

5. Theoretical conclusions

5.1 A rejection of the historical strategy

One of this paper's major concerns has been to investigate the normative soundness of historical rights and whether indigenous groups have good reasons to claim ownership of territory and resources by reference to corrective justice. If we apply a Nozickean theory of rights on these demands, we can say that indigenous people like the Saami in Norway are entitled to a piece of land if they were the first group of people to occupy or cultivate it or by means of a contract or a voluntary transfer. Whether an appropriation is sound or not is regulated by three principles: *Justice in acquisition*, *justice in transfer* and *the principle of rectification*. If someone has been deprived of the right to property, Nozick relies upon our ability to repair this injustice. His principle of rectifying historical injustice is based on an idea of causal inspection, and he seems to be confident about our ability to gain enough information to straighten out possible misconduct in the past. I object to this account of morality for several reasons.

My first objection contends that historical reasoning fails because of the epistemological difficulties that seem to be an inescapable part of looking backwards for normative answers. We may not even be able to get a good account of an injustice that happened recently or a few years back, and the story becomes more difficult to depict the further back in time we go. Compensation may perhaps be a fair demand if the ones responsible are still living and can be identified, but what about cases that concern human beings who lived hundreds or maybe a thousand years ago? As held by Lyons, Sher and Waldron, the assignment of bringing the present state of affairs closer to what would hypothetically be the result if a certain wrong act had not happened is an almost impossible enterprise and therefore unsound as a prescriptive social arrangement.

We may argue that moral judgement is first and foremost a matter of choices, and the only choices that we can improve are the ones ahead of us. For this reason we should leave history when dealing with questions such as ownership of land and instead direct our view towards what can be done to establish justice now or sometime in the future. If contemporary members of an indigenous group suffer from years of ignorance in regard to territorial demands and customary practices, we are obliged to work out solutions which recognise the consequences of future action. When right and wrong is evaluated due to its consequences, justice becomes a matter of improving or at least not worsening a present situation. Consequently, instead of insisting on people's historical rights to ownership of land and resources, we should investigate whether such claims can be justified on reasons that involve people's needs and what may contribute to human well-being *today*.

Another reason why the proposed historical argument becomes hard to justify is because it provides too little leeway for redistribution of goods if the overall social conditions have worsened. If we rely on the consequences of human conduct when solving normative disputes to questions like property rights, it is reasonable to claim that these rights do not survive *all* social changes. As Lyons island analogy illustrates, it may be necessary for an indigenous group to share initial rights and possessions if resources become scarce sometime in the future. But although time may create new distributive challenges and rights may fade in a moral way, we may be obligated to respond to a situation of *persisting injustice*. Under such conditions, we may be in a position where contemporary members of indigenous societies are deprived of their chances to satisfy their needs and rights which secure them a fair share of the attainable resources in a particular society.

5.2 The culture arguments for justifying ownership of land and resources

The idea of persisting injustice can be transferred to a way of reasoning where indigenous peoples' *prima facie* rights to obtain ownership of land and resources are comparable to a demand for cultural recognition. This forward-looking approach can

be combined with Joseph Raz' definition of a right: person X has a right if and only if X can have rights and only if an aspect of X's well-being or interest is an adequate reason for holding other persons under a duty.

Will Kymlicka believes that a people's cultural or national belonging is a precondition for their ability to act as rational creatures. I disregard this explanation and delineate two alternative arguments:

- 1) the subjective good argument and,
- 2) the expectancy argument.

In my alternative explanation I argue for the right to ownership of land and resources that is grounded on people's partial interests or subjective obligations. Property is thus considered an empirically conditioned desire. These kinds of personal affiliations can be related to what Larmore (1987: 132) exemplifies as "the duties of friendship and the demands that stem from our participation in some concrete way of life or institution". As Tamir argues, cultural identity is an important feature of people's sense of well-being and thereby an interest that justifies holding others under duty.

A second reason to endorse certain cultural practices is because they mould important social institutions. People's shared beliefs and rule-governed patterns of behaviour are important because they help us to foresee opportunities and choices including likely options, attainments and needs. Cultural attachments are then considered to play a decisive role when people try to structure their positions in society and seek to accomplish legitimate *expectations* about life. Although members of communities will commonly be interested in protecting subjective goods, we must always evaluate the appropriateness of applying rights and duties to such interests. The argument for cultural stability and indigenous peoples' need to be able to anticipate their future must also be appraised together with the interests of those who do not belong to these particular communities. When we weigh up the normative conflicts that may follow this kind of reasoning, we may have to count on our ability of *moral judgement*. This

insight may provide us with knowledge that property rights must always bend to the needs and interests of human beings. As I have pointed out several times, ownership of land or resources is not, as Nozick declares, an unconditional normative category that can be grounded solely on a statement which contends that humans have rights.

6. The Saami rights issue – an illustrating case

6.1 A quest for land and culture

It is a common view among many Saami that they were the first inhabitants to settle in the area known as *Saameland*, an area which today covers large part of the northern territories of Norway, Sweden and Finland ¹. It has also been claimed that rights to land and water in this region can be justified by these groups' long-standing, common occupation and use of natural resources in these parts of the world (Eide 2001: 137). As a part of this story it is commonly recognised that Finnmark has been populated for more than 10,000 years and that the Saami were probably the first ethnic group to settle in the region. Historical research presumes that they lived in Finnmark at least as far back as 2000 years, while it is thought that lasting Norwegian settlements did not occur before the 13th and 14th century (Pedersen 1999: 128 ²).

In addition to being categorised by the UN as an indigenous group, the Saami people of Northern Fenno-Scandinavia have also been classified as a “land-based minority” (Svensson 1997: 7). Many of those who have chosen to maintain the traditional way of life involving pastoral reindeer herding, hunting, fishing and gathering identify themselves as members of what Kymlicka and others have looked upon as a culturally distinguished society. Across the national borders in this area the idea of *Saapmi*, which means something like “our land”, reflects how territory is interwoven in their collective memory of shared language, folklore, mythology and economy (Mayor 2001: 265, Svensson 1997: 9-10).

¹ Approximately 400,000 individual Saami live in Norway today, 17,000 live in Sweden and around 6,400 lives in Finland. There are also small groups of Saami living in the northwest of Russia (Eide 2001: 128).

² Aftenposten (2004) *Et samisk syn: Arven fra norsk Nasjonalisme i Finnmark*.

6.2 Recent history

In the 1920's a small group of Saami activists established a small opposition campaign against the ongoing assimilation policy. 30 years later, the "*Saami Movement*", a party of ethno-political idealists, aimed at boosting cultural integrity among the Saami people and to remake consciousness about what was considered a common identity under threat (Semb 2001: 189). Saami demands for self-determination as a cultural group and the obtainment of legal recognition of management of land and water did not become a significant political issue until after the Alta affair in Finnmark in 1979. (Semb 2001: 189, Eide 2001: 134). The heated discussion began after the Norwegian parliament had approved the building of a hydroelectric power station that involved the damming of the river Alta. This action, it was stated, would harm natural resources connected with reindeer herding and infringe on the Saami people's customary and historical rights to land and water in the region. It was claimed that the damming of the river could not be morally or legally accepted. Despite the fact that the protests were put to an end by mass arrests of opponents to the project in 1981, the turmoil is said to be a point of change in the official politics towards Saami people as a ethnic and cultural group. Those concerned about their cause argued that Norway was in need of a clarifying process in regard to the claims demanding rights put forward by members of these communities (Ibid.: 189).

The somewhat remedial and softening reply towards the Saami people as a cultural group and a minority became a contrast to the assimilation policy that had been the official approach for more than hundred years. Distinct rights had already been established in laws such as the Reindeer Herding Law (a law that gave the reindeer herders a judicial right to practice this livelihood in customary reindeer herding areas), but prior to the Alta affair the decision-makers attention on questions such as ownership or protection of the Saami culture and political representations was rather poor.

The situation following the days in the early 80's was seen as a tremendous challenge to local authorities, the government and parliament representatives, Saami organisations and all the citizens who lived in the county of Finnmark. From that time their cultural and territorial demands entered the political and public arena nationally and abroad and the questions about their political and legal destiny caused a puzzle that is yet to be solved. For example, it became necessary to find out how the state should treat their Saami citizens and to shed light on the questions about their future life in their traditional habitation (Eide 2001: 134, Semb 2001: 189-190).

6.3 The Finnmark Act and a new administrative body

Since the Alta affair in the early 1980's, the government has made serious attempts to examine the moral and legal implications of Norway's responsibility towards the Saami people as an indigenous minority. The Saami Rights Commission (*Samerettsutvalget*) was appointed by the government in order to clarify these questions and to examine possible changes in policy with regard to their political representations and the reasonableness of a future Saami political body and their claims to management of land and resources. A major problem was how this could be managed within the boundaries of the Norwegian State and in harmony with the democratic values and traditions of Norwegian policy-making.

In April 2003, seventeen years after the commission was given its assignation, the government submitted the Finnmark Act (Semb 2001: 189). Based on the commission's work the government has suggested that a new administrative body, the Finnmark Estate (*Finnmarkseiendommen*) should be the new owner of the land in Finnmark. The government has also suggested that the Saami Parliament (established in 1989) and Finnmark County Council should be given equal rights to elect three of the six members each with the right to vote to the new board of the proposed land management body (Eira 2003: 1). The proposed law and the constitutional arrangements suggested by the government have been regarded by various Saami organisations as unacceptable and up to now a parliamentary decision has not been

made. Consequently, a final solution to the Saami people's demands for historical rights in Finnmark remains undetermined.

6.4 Historical injustice and a forward-looking reply

Besides the demands for cultural recognition, many of Saami descent claim some form of remedy or recompense due to what is regarded as dispossession of their historical rights to resources and land in the region. This thought was stated officially in 1954 when the Saami Council of Finnmark proclaimed that the Saami people, as a collective, were the rightful owners of the mountain plateau and the island and coastal areas which had been under their permanent use since the earliest days of settlement in the region (Eide 2001: 128, Jebens 1999: 394).

A common claim among those who support the recognition of such rights is that the territory of land and resources in Finnmark has wrongfully been reserved as an enduring affair of the state. The Norwegian state owns today approximately 96 percent of all territory in the county. Recent historical research has aimed to reveal that the unyielding state ownership of this land is misguided. Some scholars have persistently argued that many Saami, as far back as the 18th and 19th century, had more or less exclusive usage rights to land and water in the region. From around the middle of the 19th century, the Norwegian authorities began to ignore Saami customary practice in Finnmark. It was claimed that the only legitimate landowner was the Norwegian Crown or state (Eide 2001: 141-142, Pedersen 1999: 132-136).

The nationalistic area and the policy of assimilation

It has been argued that Saami ownership of land was being disregarded at a time when the Norwegian officials were promoting and smoothing the progress of settlement from the south (Pedersen 1999: 132-136). Prior to the 18th century, the official way of behaving in regard to the Saami was more or less of "benign neglect" as Eide (2001: 132) puts it, and the territory they occupied was never formally claimed either public or state land. From about 1850, things changed. The

government had adopted the theoretical view where nomadic people (which the Saami were considered to be) could not claim rights to ownership of land. Finnmark was therefore regarded *terra nullius*, i.e., as land where previous rights to land had not been obtained. This standpoint is made known in a court case from Alta in 1864 where a legal representative wrote: “Finnmark, the old subordinate country without permanent farmers, is hereby to be known as land taken into unlimited possession and colonised by the Crown [...]”³ (Pedersen 1999: 134). From then on the Saami customary rights were eradicated more systematically than before and steps were taken in order to integrate them into Norwegian society. This process was in full swing from around 1880.

For approximately one hundred years the state practiced various forms of what may be described as forced assimilation. Missionaries were assigned by the government to convert the Saami people to become Christians and give them lessons in Norwegian way of life. Laws were passed in order to limit, and ultimately, abolish the Saami language. State officials also approved a law, the Land Sales Act of 1902, which held that persons who had not been properly integrated in the majority society should be denied the opportunity to buy land (Pedersen 1999: 137, Semb 2001: 185).

One observable reason for the changes in Finnmark was the colonisation by ethnic Norwegians throughout the 19th century. This situation caused demographic pressure as well as economic challenges in the region. From 1835 to 1900 the population increased from 11,000 to 33,000 people. One implication of this process was that the Saami population was outnumbered by the new arrivals. The Norwegian State was also performing acts of internal and external sovereignty in response to the hardening international climate in the region from the beginning of the 19th century. It was, for example, uncertain which side the Saami communities would support should a military conflict with Russia arise.

³ Translated by Pedersen.

Another common view among those who remain critical to the state's recent and historical way of thinking on these matters argue that Norwegian officials have acted unjustly by not guaranteeing equality before the law with regard to the right to own property. Eide and Pedersen (2001: 141, 1999: 129) argue that Saami people have systematically been discriminated in regard to having their property rights recognised and registered in Norwegian legal institutions. This becomes evident, they argue, when we compare the management of land in Finnmark with the practice of law and land-rights in the south. In this part of the country people have been granted codified and inherited rights to use common land and to control utilisation.

Customary law

Legal theorists have claimed in recent years that Saami communities had their own rules and ways of managing natural resources and land. These historical arrangements are on a par with *customary law* practice ⁴ (Jebens 1999: 61, Pedersen 1999: 129-137, Smith 2004). For example, the ancient *siida-principle* reflects the way many Saami people have regarded land and resources as something a group shares in common. The way the principle has been practiced throughout history varies, but among the existing reindeer herders it represents the seasonal land used for grazing and husbandry – in other words, the territory and the resources used by the herding community.

Recent investigations within the field have revealed that the practice of more or less exclusive rights to certain territories has been considered binding to the members of the *siida* as well as among people outside the community. For this reason, some believe it is appropriate to respect this practice as a legal source on equal terms with customary rights and within modern law (Jebens 1999: 61-64, Pedersen 1999: 129-13). One of the major reasons why this practise has not gained recognition within the

⁴ Customary law is here regarded as a form of unwritten regulation that is based on long-time usage and customary practice - norms that have been shared and accepted practise within a community and which have been handed down from generation to generation. For more details see for example Otto Jebens (1999) contribution or the report *On Customary Law and the Saami Rights Process in Norway* (1999).

Norwegian legal system is basically that the Saami have been regarded as nomads with no permanent settlements and therefore no rights to property. Another reason is that collective property rights, as explained earlier, have been comparable to common rights and not been accepted on equal terms as individual rights (Jebens 1999: 64-65).

Earlier agreements and regulations of land management in Finnmark can also be found in historical documents and old laws. A document from 1702 shows for example that the Danish king decided that the Saami people who lived in the coastal areas should be secured almost exclusive hunting rights. One important source that describes the historical management of the territory and resources in Northern Norway is the Lapp Codicil (1751). This law appendix – which has sometimes been described as the Magna Carta of the Saami – was established as a supplementary document used to resolve the border disputes in the north between Denmark-Norway and Sweden.

It has been claimed that the rules established in the Codicil illustrate that the Saami were bound to an independent judicial order that went beyond the established rules and state borders. The document is believed to demonstrate that the three countries' governments recognised that reindeer herding communities on both sides of the border should be given, due to their ancient customary tradition, continued rights to move their herds across the borders as a part of their seasonal herding practices (Jebens 1999: 89-96, Pedersen 1999: 130, Smith 2004).

The culture arguments and Saami rights to land and water

Føllesdal (2001: 103: 106) has argued that the way we respond to Saami claims to land and water is important for reasons that concern people all over the world. How we treat such minorities, he argues, will mould our consciousness and responsibility towards future solutions in regard to issues where questions of rectification of injustice in the past are involved. He also views the Saami rights issue as a case which belongs to the ongoing international debate on how ethnic and cultural diversity should be solved, politically as well as theoretically, when people of

different historical backgrounds are destined to share territory and political institutions.

It seems reasonable to state that Saami people's long-established use of natural resources in this region has not been recognised when rules and regulation of the territory have been examined and put in to practice. If we appraise their case by a backward-looking account of justice we can probably say that Saami people have rights in either by virtue of being the first to obtain and develop land and other natural resources, or by legitimate transfer of such objects with other people. Historical injustice would impose a duty of repair on those who are responsible for the wrongful losses and violation of these rights.

If we rely on this kind of information, a possible normative conclusion could be that the years of assimilation policy and discrimination of Saami customary rights demonstrates a case of historical injustice that is worthy of repair: Justice will be done to the Saami as a group and wrongdoing corrected as soon as they are given back the power to manage their old homelands as they please. It may also be reasonable to believe that we are able to establish *some* historical evidence that the customary practices of Saami people in Finnmark have been violated and ignored by the Norwegian authorities throughout history. Public files show that inherited land was more or less annexed by the Norwegian authorities. Years of forced assimilation and disapproval of their language and culture is also possible to identify. To discover the chain of acquisition and transfer in this case is perhaps less complex than in many other cases of historical injustice. The epistemological criticism of the backward-looking reasoning is perhaps not the most striking objection in this case.

However, I believe that the future management of land and resources in Finnmark must be evaluated by looking at what people's needs are now and in the years to come. We must therefore bring in considerations where property rights are evaluated on a larger scale. Future exploitation of natural resources, such as the implications of future oil industry in the Barents Sea, is one apparent example that most certainly would concern Saami interests as well as future state and private interests in the

region. Consequently, we must be prepared to face moral conflicts and that the forthcoming developments in the region most certainly involve diverging interests. A *prima facie* justification of Saami rights to land and water is nevertheless possible to portray.

As an indigenous people, they both ought to have a right to satisfy their partial collective interests and to have the opportunity to enjoy a fair share of the resources that are available in the territory. Property can be regarded as a kind of subjective good, or as the shared commitments and duties that originate from their long-time, inherited occupation in Finnmark. Their cultural identity and social commitments are thus considered to be an important aspect of their well-being and an interest that justifies holding other people or states under a duty. A second reason is that the people's shared beliefs and customary rules of behaviour are believed to provide them with the ability to meet expectations in life. Their shared rules and institutional practises, like the *siida*-system and other customary practises of using the resources in Finnmark, represents cultural practises that ought to be respected by the larger society.

We are thus obliged to resolve how the indigenous groups in the area should be given a chance to decide their own affairs in regard to the future social developments in their traditional homeland. Moral judgement would conceivably help us see that contemporary members of Saami societies ought to have a priority if, for example, their collective interests compete with someone who wishes to build a golf club on their ancestral homelands or if the state decided to give away land to new settlers in the region. Such practical, normative considerations, I believe, must be applied when the future political and legal management of the territory is to be finally decided.

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